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FILE COPY

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, PETITIONER

v.

THE A. S. KREIDER COMPANY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

CITATIONS

CASES:

BLANK PAGE

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Opinions Below

The first opinion of the District Court (R. 25-26) is reported in 30 F. Supp. 722. The opinions in the Circuit Court of Appeals on the first appeal (R. 27-33) are reported in 97 F. (2d) 387. The second opinion of the District Court (R. 34-37) is reported in 30 F. Supp. 724. The opinion of the Circuit Court of Appeals on the second appeal (R. 41-46) is reported in 117 F. (2d) 133.

Statement of the Case.

Two omissions must be supplied in the statement of the case appearing on pages 3 and 4 of the petition herein.

The date of the filing by the respondent of the waiver of its right to have its taxes for the taxable year 1920 determined and assessed within five years after the return was filed, was prior to June 15, 1926 (R. 4, par. No. 3).

The collector of internal revenue by whom the tax in suit was collected was no longer in office at the time this suit was commenced (R. 3-4, par. No. 2).

Summary of the Argument

The respondent contends that there are no special and important reasons in this case to justify a request that this Court exercise its discretion in granting a writ of certiorari.

This case does not present such conflict of decisions as is contemplated in Rule 38, par. 5 of the Revised Rules of this Court, nor does it involve an important question of federal law not settled by this Court.

A claim for refund filed pursuant to the provisions of Sec. 284(g) of the Revenue Act of 1926 is timely if filed within four years after the payment of the final portion of the tax, and thereupon attaches to the entire tax, irrespective of the dates of payment of prior installments thereof.

This is a suit upon an allowed claim for refund, and not upon a rejected claim, and the suit was properly commenced within six years after the date of allowance, under the rule laid down by this Court in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, and this suit being for the recovery of an internal-revenue tax erroneously collected, and the collector of internal revenue by whom such tax was collected being no longer in office at the time this suit was commenced, the District Court had jurisdiction of the suit under the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20).

ARGUMENT

I

There are no special and important reasons in this case which call for the exercise of this Court's discretion in granting a writ of certiorari.

The decision of the Court below, and the decision of the District Court which was affirmed thereby, directly followed the decision of the Court of Claims in *Hills* v. *United States,* 50 F. (2d) 302, which is the leading case on the primary question of law involved herein. This question relates to the right of a taxpayer to a refund of his entire overpayment of tax if the claim for refund is filed within four years after the final portion of the tax is paid.

The Court below followed the *Hills* case and said:

> "By 'the tax', the entire tax for a particular year is meant and not merely some portion of it. The entire tax for the year is not paid until the last installment or deficiency assessment has been paid. Hills v. United States, 50 F. 2d 302, 305-307 (Ct. Cl.), confirmed on rehearing, 55 F. 2d 1001;" (R. 45)

The District Court had likewise followed the *Hills* case and said:

> "The Courts have uniformly ruled in cases involving the revenue acts that the time when the tax shall be deemed paid, for the purpose of statutes of limitation, is the date upon which the final payment was made, and the words 'the tax' refer to the entire tax and not a portion thereof. Hills v. U. S. 50 F. (2d) 302; sustained on reargument, 55 F. (2d) 1001;" (R. 36)

The Court of Claims subsequently, in the case of *Weinburg* v. *United States,* 25 F. Supp. 83, misapplied its own rule, and the Courts below differed with this misapplication.

Rule 38, par. 5, of the Revised Rules of this Court indicates the character of reasons which will be considered upon a request for the exercise of this Court's discretion in granting a writ of certiorari. One of these reasons is "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter".

It was not contemplated, under Rule 38, par. 5, that a writ of certiorari should issue to a circuit court of appeals because of a conflict of decision between that court and a district court, nor because of a conflict of decision between a circuit court of appeals and the Court of Claims. Rule 38, par. 5, only mentions a conflict of decision between a circuit court of appeals and another circuit court of appeals. Had this Court intended that a writ of certiorari should be issued to a circuit court of appeals because of a conflict between its decision and a decision of the Court of Claims, it would undoubtedly have said so in Rule 38, par. 5.

The Court of Claims is a lower court of original jurisdiction, and in this respect is in the same class as the district courts. In fact, under the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20) the Court of Claims and the district courts have concurrent jurisdiction in many cases. The circuit courts of appeal, on the other hand, are appellate tribunals and courts of record, and as such their decisions outrank the decisions of the Court of Claims.

No question of gravity and general importance is involved in the construction of Sec. 284.(g) of the Revenue Act of 1926 (Appendix, *infra*, p. 30), under the provisions of which the claim for refund herein was filed. This section relates to a special and limited group of cases involving the old excess-profits tax years 1917 to 1921, inclusive, where the taxpayers had filed waivers extending the Commissioner's time to determine and assess their taxes. This section has no applicability to refunds of taxes for any year subsequent to 1921, and no similar provision is contained in any revenue Act after the 1926 Act. Very

few cases, within the scope of this section, can still be open, and the amount involved in the instant case is comparatively small.

Unless a question of public importance is involved, the judicial discretion of this Court, in granting a writ of certiorari, will generally not be exercised.

This Court in the case of *Fields* v. *United States*, 205 U. S. 292, 296, said:

> "In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits."

The above rule was reiterated by Chief Justice Taft in the case of *Magnum Import Company, Inc.* v. *City*, 262 U. S. 159, 163, in which he said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The other question, involved herein, is the timeliness of the commencement of this suit, and the jurisdiction of the District Court thereof. The decision of the Court below on this question should not be reviewed by this Court by certiorari, because that decision of the Court below is not in conflict with applicable decisions of this Court, and does not involve a question which has not been, but should be, settled by this Court but, on the contrary, directly follows the decisions of this Court in the cases of *Bonwit*

Teller & Co. v. *United States*, 283 U. S. 258; *Bates Mfg. Co.* v. *United States*, 303 U. S. 567, and *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276.

II

Sec. 284 (g) of the Revenue Act of 1926 permitted the recovery of the tax paid in 1921 because the claim for refund was filed less than four years after the payment of the final portion of the tax.

Sec. 284(g) of the Revenue Act of 1926 relates to that special and limited class of cases, such as the instant case, involving refunds of income, war-profits, or excess-profits taxes for the years 1917 to 1921 only, in which the taxpayer filed a waiver extending the time for the determination and assessment of his taxes. The language of said section, to the extent that it is pertinent to our case, is as follows:

> "(g) * * * If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 * * * then such * * * refund relating to the taxes for such taxable year 1920 * * * shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid * * *."

The respondent filed a waiver prior to June 15, 1926 in respect of its taxes for the taxable year 1920, and paid its tax for that year on July 29, 1926, and filed a claim for refund thereof on March 23, 1929 or within four years from the time the tax was paid.

It is well settled that the date on which a tax is considered paid is the date on which the final portion of the tax is paid. The tax is not paid while any portion of it is still open. The tax is a single, unitary, indivisible liability which is paid only when the final payment is made and the obligation is discharged.

The Court of Claims, in the case of *Hills* v. *United States*, 50 F. (2d) 302, interpreted the similar provision of Sec. 3228 R. S. to the effect that a claim for refund of tax must be filed "*within four years next after payment of such tax,*" and held that the tax shall be deemed paid on the date upon which the final payment of the tax is made, and that the tax paid at that time is the entire tax and not a portion thereof.

The Court of Claims has followed this rule in the cases of *Haebler* v. *United States*, 8 F. Supp. 855, and *Safe Dep. & Trust Co.* v. *United States*, 9 F. Supp. 606.

The district courts have also followed this rule in *Safe Dep. & Trust Co.* v. *Tait*, 8 F. Supp. 634; *Union Trust Co.* v. *United States*, 5 F. Supp. 259; *Clarke* v. *United States*, 5 F. Supp. 292, and *Magoon* v. *United States*, 333 C. C. H. par. 9294.

The circuit courts of appeals have likewise followed the rule of the *Hills* case in *Clarke* v. *United States*, 69 F. (2d) 748, cert. denied, 293 U. S. 564; *Union Trust Co.* v. *United States*, 70 F. (2d) 629, cert. denied, 293 U. S. 564, and *Magoon* v. *United States*, 77 F. (2d) 804.

In *Union Trust Co.* v. *United States*, 70 F. (2d) 629, the Circuit Court of Appeals for the Second Circuit said, at page 630:

> "the tax liability is unitary and was not discharged until paid in full."

The petitioner, on pages 7 and 8 of its petition herein, concedes that the respondent, having filed a waiver prior to June 15, 1926, had at least until April 1, 1927 within which to file a claim for refund of its 1920 taxes. The opinion of the Court below shows that the petitioner admitted in that Court "that had the claim for refund been filed prior to April 1, 1927, a claim for the refund of the whole of the tax paid for the particular tax year could have been made" (R. 45). The petitioner, however, still contends, as it did in the Court below, that the payment of the final portion

of this tax in 1926 did not permit the taxpayer to file, within four years from that date, a claim for refund of the entire tax.

On page 9 of its petition, the petitioner attempts to uphold its contention by citing the Court of Claims decision in *Weinburg* v. *United States,* 25 F. Supp. 83.

The confusion on the part of the petitioner and the Court of Claims is caused by their failure properly to read the alternative provisions of Sec. 284(g) governing the filing of claims for refund. This alternative reads as follows:

> "* * * if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid * * *."

An examination of the definitions of the words used in this alternative phrase will make it apparent that the taxpayer must have the same rights under the second branch of the alternative as he has under the first branch.

Webster's New International Dictionary, Second Edition, Unabridged, gives the following definitions:

> "either, *conj.* * * *;—used before two or more co-ordinate words, phrases, or clauses which are joined by *or*;"
>
> "or, *conj.* A co-ordinating particle that marks an alternative; * * *
>
> "co-ordinate, *adj.* Equal in, or in the same, rank or order; not subordinate; * * *."

It is therefore obvious that the two branches of the alternative phrase, being preceded by the word "either" and joined by the word "or," are of equal rank and neither of them is subordinate to the other.

The Court below upheld this interpretation of this alternative clause, and said:

> "No plausible reason is advanced why a claim for refund for 1920 taxes under subsection (g) may be larger if filed on or before April 1, 1927, than if filed

after that date but within the equally permissible period of four years from the time the tax was paid. To reach such a conclusion would require that one of two co-ordinate clauses be treated as superior to the other" (R. 46).

The District Court ruled to the same effect and said:

> "Subdivision (g) provides that claim may be made *either* on or before April 1, 1927, *or* within four years from the time the tax was paid. With such phrasing, the Act clearly sets forth alternate and equal exceptions and to limit one and not the other would be a perversion of the language of the act itself.
>
> "Furthermore, if the provision 'or within four years from the time the tax was paid,' were construed as in the Weinburg case, the provision would thereby be rendered superfluous. Such a result is to be avoided wherever possible under the ordinary rules of statutory construction" (R. 37).

We might add that such a result should likewise be avoided under the ordinary rules of English grammar.

The independence of these two co-ordinate alternatives will be more clearly understood if it is borne in mind that the phrase containing the date April 1, 1927 is a reenactment and enlargement of the original provision of Sec. 252, of the Revenue Act of 1921 which provided that a claim for refund may be filed before the expiration of five years *from the date when the return was due,* and that the phrase "four years from the time the tax was paid" is a reenactment of the provision of Sec. 3228 R. S. permitting a claim to be filed within four years next *after payment of the tax.* These two provisions were always independent and co-ordinate.

Legislative History of Sec. 284 (g)

The above statement is readily supported by an examination of the legislative history of this section.

In January 1923, the filing of a claim for refund was governed by Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 24) and by Sec. 3228 R. S. as amended by the Revenue Act of 1921 (Appendix, *infra*, p. 24). Sec. 252 of the Revenue Act of 1921 provided that claim for refund must be filed before the expiration of *five years from the date when the return was due*, and Sec. 3228 R. S. contained the alternative provision that claims for refund must be filed *within four years next after payment of the tax*. This latter provision is the one which was interpreted by the Court of Claims in the case of *Hills* v. *United States, supra*. Hence at that time a claim for refund of income taxes could have been filed in the alternative, *either* five years after the return was due, *or* four years after the tax was paid.

The Commissioner had followed the practice of taking waivers from taxpayers to extend his time for making additional assessments, but it was doubtful whether these waivers were legally effective to extend the taxpayer's time to file a claim for refund. A taxpayer might sign a waiver extending the time for additional assessment, but if the final audit showed an overpayment of tax, the taxpayer might have no right to claim the refund.

To overcome this inequity, Congress on March 4, 1923 passed a special Act amending Sec. 252 of the Revenue Act of 1921 (Appendix, *infra*, p. 26). This amendment inserted a clause in Sec. 252 to the effect that if a taxpayer had filed a waiver on his 1917 taxes, a claim for refund could be filed by him either *within six years after the return was due*, or *within two years after the tax was paid*.

This Act, therefore, enlarged the period after the return was due from five years to six years, but preserved the right of the taxpayer to file a claim within a given period after the tax was paid.

While the above Act of March 4, 1923 was still pending as a Bill in Congress, the Secretary of the Treasury wrote a letter, dated January 23, 1923, to the Acting Chairman

of the Committee on Ways and Means of the House of Representatives, in which he approved the proposed amendment. In this letter the Secretary referred to the then practice of his Department in the following words:

> "The present ruling of the Treasury Department is * * * that a refund * * * may be made if claim therefor was filed within four years after the tax was paid although not within five years after the return was due."—Report of House Committee on Ways and Means—Internal Revenue Cumulative Bulletin, 1939—1 (Part 2), p. 849.

The Secretary, in a later portion of the same letter said as follows:

> "* * * consequently it is deemed advisable to clarify the situation by means of legislation, and provide unequivocally that a claim for refund or credit may be considered by the Department if filed within a given period after the tax was paid even though not within five years from the time the return was due."—Same Report, p. 850.

After the enactment of this Act of March 4, 1923, the Commissioner of Internal Revenue issued a Treasury Decision explaining said Act, and said:

> "Until March 4, 1923, a claim for refund * * * could be allowed after five years from the date when the return was due, even though such claim was not filed by the taxpayer until after the expiration of the five years, if such claim was presented to the Commissioner of Internal Revenue within four years next after payment of the tax."—Treasury Decision 3462, II-1 Cumulative Bulletin, p. 180.

The Commissioner, in this Decision, then proceeded with an explanation of the Act of March 4, 1923, and stated that under it a claim could be filed by a taxpayer in the alternative of either six years after the return was due or two years after the tax was paid.

From the above it is obvious that the Secretary of the Treasury and the Commissioner of Internal Revenue recognized that it was the intent of Congress to permit a claim for refund to be filed within a given period after the tax was paid, even though that be after the the expiration of the fixed period after the return was due.

In 1924 the same situation arose with regard to taxes for 1918, and Congress passed the Act of March 13, 1924 (Appendix, *infra,* p. 26), further amending Sec. 252 of the Revenue Act of 1921, to grant a similar extension with respect to taxes for the year 1918, and an additional year for 1917 taxes.

The filing date of all 1918 returns had been extended by the Commissioner from March 15, 1919 to June 15, 1919. The Act of March 13, 1924 therefore set the filing date of 1918 waivers at June 15, 1924 or five years after the returns were filed. The filing date of all 1917 returns had been extended by the Commissioner from March 15, 1918 to April 1, 1918, hence the Act of March 13, 1924 set April 1, 1925 as the fixed date for the expiration of the seven year period after the 1917 returns were due and of the six year period after the 1918 returns were due.

Thereafter in all subsequent amendments of this provision, the date of April 1st of an appropriate year was used to designate the lapse of time after the return was due, and this date of April 1st still relates to the enlarged number of years after the due date of the return as distinguished from the period of years after the payment of the tax.

The provisions of Sec. 252 of the Revenue Act of 1921, as amended by the above two Acts, were carried forward into Sec. 281 of the Revenue Act of 1924 (Appendix, *infra,* p. 27). The 1923 and 1924 amendments became Sec. 281(e) of the Revenue Act of 1924, practically without change, except that the period of two years after the tax was paid, was changed to four years to conform to the period of time allowed in Sec. 3228 R. S.

Prior to the Revenue Act of 1924 there had been no restriction upon the amount that could be reached by a claim for refund. If the claim was filed within the statutory period after the payment of the final portion of the tax, it could reach the entire tax irrespective of the dates of payment of prior installments.

Sec. 281(b)(2) of the Revenue Act of 1924, for the first time placed a restriction upon refunds, by limiting general refunds to the portions of the tax paid during the four years immediately preceding the filing of the claim. Sec. 281(b), however, expressly excepted from its provisions the class of cases covered by subdivision (e). Congress took this means of preserving the rights of taxpayers who had filed waivers. Sec. 281(b)(2) of the Revenue Act of 1924, subsequently became Sec. 284(b)(2) of the Revenue Act of 1926, and Sec. 281(e) of the Revenue Act of 1924 subsequently became Sec. 284(g) of the Revenue Act of 1926.

In spite of the clear language of Sec. 284(b) which expressly excepts Sec. 284(g) from its provisions (Appendix, *infra*, p. 29), the petitioner, on pages 8 and 9 of the petition herein, claims that Sec. 284(g) of the Revenue Act of 1926 is restricted and qualified by Sec. 284(b)(2) of that Act.

The petitioner attempts to support its erroneous contention by relying upon one sentence from a paragraph of a report of the Senate Committee on Finance concerning the Revenue Act of 1924. This paragraph relates solely to Sec. 281(b) of the Revenue Act of 1924, and reads as follows:

> "Section 281(b): The limitation on credits and refunds contained in the first proviso of section 252 of the existing law was changed in the House bill in two principal respects. The date from which the period of limitation runs was changed from the due date of the return to the date of the payment of the tax. Logically the period of limitation should run from the

> date of payment, since it is at that time that the right accrues. Again the complicated provisions of the present section with reference to the length of the periods of limitation, which vary from two years from the time the tax was paid to six years from the time the return was due, were simplified by fixing the period at four years. In order that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax, a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years immediately preceding the filing of the claim."—Report of Senate Committee on Finance—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 289.

The petitioner, toward the end of page 8 of its petition herein, uses the argument set forth in the last sentence of the above quoted paragraph as though it applies to Sec. 281(e) whereas it only applies to claims for refund filed pursuant to Sec. 281(b) and not to the special and limited class of cases covered by Sec. 281(e), which were expressly excepted from the provisions of Sec. 281(b). The petitioner also overlooks the very next paragraph of the same report, which relates to Sec. 281(e) and contains no such restriction. This paragraph reads as follows:

> "Section 281(e): This subdivision has been inserted by the committee, to provide that if the taxpayer has (1) within five years from the time his return for 1917 was due, filed a waiver of his rights to have the taxes due for that year determined and assessed within five years after his return was filed, or if he has (2) filed such a waiver on or before June 15, 1924, in respect of the taxes due for 1918, a credit or refund may be allowed if claim therefor is filed on or before April 1, 1925, or within four years after the tax was paid. Corresponding provisions are contained in an Act approved March 13, 1924."—Same report, p. 289.

The District Court, in its second opinion was justified in stating that the final sentence of the first above quoted

paragraph relating to Sec. 281(b) dealt with a different statute and was not directed to the particular provision here involved (R. 36). Likewise the Court below was right, when it said in its opinion on the second appeal, that the scope and intendment of subsection (g) are separate and distinct from claims for credit or refund such as are dealt with in subsection (b) (R. 46).

Whether (b) and (g) be called subdivisions, subsections, or separate statutes, the fact remains that they are separate entities and are mutually exclusive. The independence of separately lettered subdivisions has been recognized by Congress. The Committee on Ways and Means of the House of Representatives once said:

> "* * * it was deemed advisable to subdivide section 252, as amended by this bill, into paragraphs (a), (b), (c), and (d) in order to avoid confusion in the administration of the same and to clarify the fact that each section is a separate entity."—Report of Committee on Ways and Means of House of Representatives—Internal Revenue Cumulative Bulletin, 1939-1 (Part 2) p. 850.

Sec. 281(e) of the Revenue Act of 1924 was later amended by Act of March 3, 1925 (Appendix, *infra*, p. 28). This amendment extended this section to include taxes for the year 1919, and granted further time if the waiver filed by the taxpayer was extended.

Sec. 284 of the Revenue Act of 1926 (Appendix, *infra*, p. 29) carried forward the provisions of Sec. 281 of the Revenue Act of 1924, and Sec. 284(g) reenacted the previous Sec. 281(e) and extended this provision to cover the taxable years 1920 and 1921.

This chain of enactments was clearly made by Congress for the purpose of preserving the rights of taxpayers who had filed waivers. These taxpayers always had the right and Congress intended that they retain the right to file a claim for refund either within a fixed period after the due date of the return, which was set as April 1st of an appro-

priate year, or within the alternative given period after the payment of the tax, even though the second period of time extended beyond the expiration of the first. These two alternatives were always coordinate and independent.

The petitioner, on page 8 of its petition herein, concedes that a claim herein filed prior to April 1, 1927 pursuant to the provisions of Sec. 284(g), could reach the entire 1920 tax, and would not be restricted by Sec. 284(b)(2). It is equally true that the claim herein filed pursuant to the provisions of Sec. 284(g), prior to four years after the tax was paid, is likewise not restricted by Sec. 284(b)(2). As stated by the Court below, no plausible reason is advanced to the contrary (R. 46).

III

This suit was timely commenced within six years after the claim was allowed, and the District Court had jurisdiction.

The timeliness of this suit has been settled by this Court in the case of *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258.

The *Bonwit Teller* case involved a refund of taxes for the fiscal year ended January 31, 1919. Aside from the question of whether a certain letter written by the taxpayer to the Commissioner was the equivalent of a claim for refund, which was resolved in favor of the taxpayer, the pertinent facts were as follows:

On July 14, 1919 the taxpayer paid half of its taxes for the fiscal year ended January 31, 1919, and on December 13, 1919 it paid the remaining half.

On May 16, 1925 the Commissioner wrote to the taxpayer that he had found an overpayment of $10,866.43 for the year ended January 31, 1919, which could not be refunded unless the taxpayer filed a waiver before June 15,

1925 in accordance with Sec. 281(e) of the Revenue Act of 1924 as amended by the Act of March 3, 1925.

On May 23, 1925 the taxpayer filed the waiver.

On May 12, 1927 the Commissioner caused to be delivered to the taxpayer a certificate of overassessment showing the overassessment of $10,866.43 and also showing that of this amount the sum of $9,846.06 had been credited against an unpaid tax of that amount for the year ended January 31, 1917 and enclosing a check for $1,462.99 for the balance of the overassessment with interest.

The taxpayer claimed that the sum of $9,846.06 had been improperly withheld because it had been credited to the 1917 tax, collection of which had been barred by the statute of limitations.

More than two years after the issuance of the above certificate of overassessment and much more than five years after the year 1919 when the tax had been paid, the taxpayer commenced suit in the Court of Claims to recover the refund for the fiscal year ended January 31, 1919.

The government contended that under Sec. 3226 R. S. (Appendix, *infra*, p. 31) the suit was brought too late, because it had not been brought within five years after the date of the payment of the tax, nor within two years after the disallowance of the claim for refund. This is exactly the same contention raised by petitioner in the instant case on pages 9 and 10 of its petition herein.

This Court, in the *Bonwit Teller* case, overruled that contention of the government and held that the claim had not been disallowed but had been allowed, that the cause of action arose on May 12, 1927 upon the issuance of the certificate of overassessment and that the suit was timely commenced within six years after that date, and that neither the five year period after the payment of the tax, nor the two year period after a disallowance of a claim applied to that case. At page 265 of that decision this Court said:

"The government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by Rev. Stat. Sec. 3226, as amended. U. S. C. title 26, Sec. 156. It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. United States v. Kaufman, 96 U. S. 567, 570, 24 L. ed. 792, 793; United States v. Real Estate Sav. Bank, 104 U. S. 728, 26 L. ed. 908; Bank of Greencastle's Case, 15 Ct. Cl. 225. There is no merit in the contention that the suit is barred."

The rule laid down by this Court in the *Bonwit Teller* case is founded upon the provisions of Sec. 281(a) of the Revenue Act of 1924 (Appendix, *infra*, p. 27) which became Sec. 284(a) of the Revenue Act of 1926 (Appendix, *infra*, p. 29). This Sec. 284(a) provides that where there has been an overpayment of any income, war-profits, or excess-profits tax, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax *then due* from the taxpayer, and the balance shall be refunded *immediately* to the taxpayer.

Under this section, upon the determination of the overpayment and the issuance of the certificate of overassessment as evidence thereof, the refund became *immediately* due and payable, and the taxpayer's cause of action for the recovery thereof thereupon accrued.

When a taxpayer files a claim for refund the Commissioner must audit the account. If he finds that there was no overpayment he disallows the claim, and the taxpayer may have this finding reviewed in court by a suit on the disallowed or rejected claim.

If, on the other hand, the Commissioner finds that there was an overpayment of tax by the taxpayer, he must certify this finding, which he proceeds to do by a certificate of overassessment. This finding that there was an overpayment constitutes an allowance of the claim, and this Court so ruled in the *Bonwit Teller* case, and such finding remains an allowance of the claim to the full extent of the overpayment found, irrespective of any extraneous erroneous conclusion of fact or law that the Commissioner might have placed on the certificate.

Having certified the overpayment, the Commissioner has no further choice, and is not called upon to exercise any discretion, or to make any promise or agreement regarding the refund. He transmits his certificate to the Treasury and states thereon the amount of the overpayment and the existence of any other tax *then due* from the taxpayer. The mandate of Sec. 284(a) thereupon comes into play. The certificate is merely evidence of the Commissioner's findings and upon this evidence and pursuant to the mandate of Sec. 284(a), the Treasury completes the credit and must refund the balance *immediately* to the taxpayer.

The overpayment may only be credited to any tax then due. This does not permit the overpayment to be credited to a barred deficiency, because a barred deficiency is outlawed and is not *then due*. Therefore this Court found in favor of the taxpayer in the *Bonwit Teller* case, because the Commissioner had attempted, in violation of the clear mandate of the statute, to cause the overpayment to be credited to a barred deficiency which was not *then due*.

Under the rule in the *Bonwit Teller* case, the claim is none the less allowed in the full amount of the overpay-

ment found, even though the Commissioner placed on the certificate a statement that part of the overpayment had been credited against a tax then due, when such was not the fact because no tax was then due. Similarly, the claim is allowed in full, as in the instant case, even though the Commissioner erroneously placed on the certificate a statement that refund of part of the overpayment was barred by the statute of limitations, when such was neither the fact nor the law because the refund was not barred.

The Commissioner having made his findings of fact as to the existence of the overassessment, the overpayment became *immediately* due and payable to the taxpayer pursuant to the mandate of Sec. 284(a), and hence, at that time, the cause of action arose in favor of the taxpayer, as held by this Court in the *Bonwit Teller* case. This was a new cause of action arising under the provisions of Sec. 284(a), and was not the cause of action limited by Sec. 3226 R. S. This new cause of action therefore comes within the general limitation of the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20) and suit thereon may be commenced within six years after the right accrued, as held by this Court in the *Bonwit Teller* case.

This new cause of action does not arise from any promise, contract or agreement made by the Commissioner, but is based on the promise or the enactment of Congress contained in Sec. 284(a). The cause of action is nevertheless for the recovery of an internal-revenue tax erroneously collected within the meaning of those words as used in the Tucker Act.

The relevant facts in the instant case are the same as the facts in the *Bonwit Teller* case. The respondent's claim for refund was not disallowed, but was allowed. The facts in the instant case are possibly even stronger, because the portion of the overassessment, not refunded, was withheld by reason of a mistaken ruling that payment thereof was barred, while in the *Bonwit Teller* case the unpaid amount was credited to a barred deficiency of tax for another year.

In the instant case the certificate of overassessment was issued in October 1929 (R. 11, 19, 26—Petition, p. 4) and the cause of action arose on that date and not in 1921 as contended by the petitioner in the footnote on page 12 of its petition herein.

This suit was commenced on March 7, 1932 (R. 1—Petition, p. 3) less than six years after the cause of action accrued as required by the Tucker Act (U. S. C. Title 28, Sec. 41, par. 20) and was therefore timely under the rule of the *Bonwit Teller* case.

The Tucker Act, as amended by Sec. 1310 of the Revenue Act of 1921 (Appendix, *infra*, p. 32), provides that the district courts shall have concurrent jurisdiction with the Court of Claims of any suit for the recovery of *any* internal-revenue tax erroneously collected, if the collector of internal revenue by whom such tax was collected is dead or not in office at the time such suit is commenced.

The instant suit was brought for the recovery of an internal-revenue tax, and the collector by whom such tax was collected was not in office at the time this suit was commenced (R. 34). The District Court therefore had jurisdiction of this suit under the Tucker Act.

The jurisdiction of the district courts in suits of this character has been directly upheld by this Court in the cases of *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276, and *United States* v. *Jaffray*, 306 U. S. 276, which were decided together.

In those cases the Commissioner issued certificates of overassessment, but credited portions of the overassessments against barred deficiencies for other years. This Court in sustaining the jurisdiction of the District Court, held th... the tax, sought to be recovered, had been collected by collectors of internal revenue who were either dead or out of office, and that the cases therefore fell within the very words of the Tucker Act, as amended.

The *Bonwit Teller* case was brought in the Court of Claims, but the same statute of limitations for commencing

suits applies in the District Court. This Court, in the case of *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, speaking through Mr. Justice Black, said at page 570:

> "The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitation applicable alike 'to any or all' of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims."

And at page 571 this Court said:

> "The erection of barriers to recovery in the District Court which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act. Uniformity and equality in substantial rights and privileges—for claimant in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation."

IV

Recapitulation

The conflict, if any, between the Circuit Court of Appeals for the Third Circuit, to which this writ of certiorari is requested, and the Court of Claims, is not such conflict of decision as is contemplated in Rule 38, par. 5, of the Revised Rules of this Court.

Sec. 284(g) of the Revenue Act of 1926 relates to a special and limited class of cases involving the taxable years 1917 to 1921, inclusive, where the taxpayers had filed waivers extending the time to assess the tax. There can be very few open cases involving the provisions of this section, and the amount involved in the instant case is comparatively small. The question involved is not one of gravity and general importance.

The question of the timeliness of the commencement of this suit and the jurisdiction of the District Court has been settled by this Court in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, and *United States* v. *Bertelsen & Petersen Co.,* 306 U. S. 276.

The Court below was correct in following the decision of the Court of Claims in *Hills* v. *United States,* 50 F. (2d) 302, and the decisions of this Court in the *Bonwit Teller* and *Bertelsen & Petersen Co.* cases.

V

Conclusion

The application for a writ of certiorari herein should be denied.

Respectfully submitted,

DONALD HORNE,
Attorney for Respondent.

Appendix

Section 3228 of the Revised Statutes, as Amended by Sec. 1316 of the Revenue Act of 1921.

Sec. 1316. That Section 3228 of the Revised Statutes is amended to read as follows:

"Sec. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by Section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 314.

Section 252 of the Revenue Act of 1921.

REFUNDS

Sec. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act

of 1916, as amended, the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of Section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: *Provided further,* That if upon examination of any return of income made pursuant to the Revenue Act of 1917, the the Revenue Act of 1918, or this Act, the invested capital of a taxpayer is decreased by the Commissioner, and such decrease is due to the fact that the taxpayer failed to take adequate deductions in previous years, with the result that an amount of income tax in excess of that properly due was paid in any previous year or years, then, notwithstanding any other provision of law and regardless of the expiration of such five-year period, the amount of such excess shall, without the filing of any claim therefor, be credited or refunded as provided in this section: *And provided further,* That nothing in this section shall be construed to bar from allowance claims for refund filed prior to the passage of the Revenue Act of 1918 under subdivision (a) of Section 14 of the Revenue Act of 1916, or filed prior to the passage of this Act under Section 252 of the Revenue Act of 1918.

Chap. 136, 42 Stat. 227, 268.

Act of March 4, 1923, Amending Sec. 252 of the Revenue Act of 1921.

That Section 252 of the Revenue Act of 1921 is amended to read as follows:

"Sec. 252(a) * * * *Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, such credit or refund shall be allowed or made if claim therefor is filed either within six years from the time the return for such taxable year 1917 was due or within two years from the time the tax was paid. * * *"

Chap. 276, 42 Stat. 1504, 1505.

Act of March 13, 1924, Amending Sec. 252 of the Revenue Act of 1921, as Amended.

That the second proviso of subdivision (a) of Section 252 of the Revenue Act of 1921 as amended by the Act entitled "An Act to amend the Revenue Act of 1921 in respect to credits and refunds," approved March 4, 1923, is amended to read as follows: *"Provided further,* That if the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within two years from the time the tax was paid."

Chap. 55, 43 Stat. 22.

Section 281 of the Revenue Act of 1924.

CREDITS AND REFUNDS.

Sec. 281(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c) and (e) of this section, (1) no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer, nor (2) shall the amount of the credit or refund exceed the portion of the tax paid during the four years immediately preceding the filing of the claim or, if no claim was filed, then during the four years immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed

such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

(f) * * * * *

Chap. 234, 43 Stat. 253, 301, 302.

Act of March 3, 1925, Amending Sec. 281(e) of the Revenue Act of 1924.

That subdivision (e) of Section 281 of the Revenue Act of 1924 is amended by adding thereto two new sentences to read as follows: "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919, shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919.

Chap. 435, 43 Stat. 1115.

Section 284 of the Revenue Act of 1926.

CREDITS AND REFUNDS

Sec. 284(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

(c) * * * * *

(d) * * * * *

(e) * * * * *

(f) * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1926, filed such a waiver in respect of the taxes due for the taxable year 1920 or 1921, then such credit or refund relating to the taxes for the taxable year 1920 or 1921 shall be allowed or made if claim therefor is filed either on or before April 1, 1927, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relat-

ing to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919, or on or before April 1, 1928, in the case of credits or refunds relating to the taxes for the taxable years 1920 and 1921. This subdivision shall not authorize a credit or refund prohibited by the provisions of subdivision (d).

(h) * * * * *

Chap. 27, 44 Stat. 9, 66-68.

Section 3226 of the Revised Statutes, as Amended by Sec. 1014, of the Revenue Act of 1924.

Sec. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two

years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act.

Chap. 234, 43 Stat. 253.

Tucker Act, Judicial Code, Sec. 24, as Amended by Sec. 1310 of the Revenue Act of 1921.

Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * * * *

(20) *Suits against United States*—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for

the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * * .

U. S. C., Title 28, Sec. 41, par. 20.
